



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
-2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

AEG
Docket No. 3221-99
30 October 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF EX-HT2 [REDACTED], USN,

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting, in essence, that the record be corrected to show that he was not discharged in February 1998 but continued to serve on active duty without interruption, and that he be reinstated in the Navy.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and McCulloch, reviewed Petitioner's allegations of error and injustice on 4 October 2000 and, pursuant to its regulations, the Board determined that partial relief is warranted. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner first enlisted in the Navy on 8 August 1989 and served in a satisfactory to above average manner, as shown by his enlisted performance evaluations and advancement in due course to hull technician third class (HT3; E-4) in June 1992.

d. On 11 July 1993 Petitioner was involved in an incident of domestic violence in the civilian community in which he assaulted his live-in girlfriend, Areole. As a result of this incident, Petitioner was convicted in civil court on 15 July 1993, placed on probation, and directed not to reside with Aerole until he enrolled and participated in the Navy's Family Advocacy

Program (FAP). During the investigation which ensued, evidence was adduced which indicated that Petitioner had abused Aerole's four-year old son, Dustin. Included in this abuse was an incident in which Petitioner allegedly hit him with a jump-rope. Allegations were also made that Petitioner had fractured Aerole's skull and leg. Petitioner apparently admitted to giving her a black eye.

e. Despite these events, Petitioner reenlisted for six years on 6 August 1993 and, on that same date, was advanced in rate to HT2 (E-5). Although his progress in the FAP was slowed by a motorcycle accident, he completed the program in December 1994. At that time, the prognosis was "fair," and the evaluator noted that "he is still not admitting full responsibility for his relationships & actions. If he continues to blame others, he . . . may lapse back into his old attitudes . . ."

f. Petitioner was reassigned, in June 1994, from USS MCKEE (AS 41) to the Security Detachment, Naval Amphibious Base, Coronado, CA, where his performance improved. In February 1996 he was reassigned to Naval Station, Panama Canal, where he was again assigned out-of-rate duties as a law enforcement specialist. He was counseled on several occasions concerning performance of duty, a domestic dispute, a verbal altercation, and indebtedness. Despite this counseling, his enlisted performance evaluations continued to reflect at least satisfactory performance.

g. On 11 May 1996 Petitioner and Areole were married, which made him stepfather to her seven year-old son, Dustin. Their married life was apparently uneventful until 2 February 1997, when Areole made a statement to a command investigator which reads, in part, as follows:

On the evening of 20 January 1997, approximately 2200 hours, my husband (Petitioner) was asleep on the couch with our daughter and I was finishing a conversation with my friend regarding tattoos and body piercing. When I hung up I was very excited my new idea about getting a tattoo. I wanted to look at the new magazine my husband had recently purchased. When I couldn't locate it by looking around I decided to ask Matt even though I knew he was asleep. I shook him and said, "Matt, where is that new tattoo magazine you bought?" After no response I shook him harder and said, "Honey, where's the tattoo magazine?" He woke up and said with enraged eyes and through gritted teeth, Get the fuck away from me, you are just bothering me, I don't know where the magazine (is,) I am sleeping . . ."

. . . His reaction scared and surprised me so I let well enough alone and decided to look in his work bag for it myself . . . I flipped through the contents from the top looking for the cover of the magazine. Matt saw or was aware of what I was doing (and) leaped from the couch towards me, grabbed the bag out of my hands and said,

"Don't fucking touch my shit bitch, stay the fuck away from my bag and don't ever touch it again." I was then pissed that he treated that bag with so much importance and just figured he must be hiding something. When he walked away I grabbed the bag and shook out its entire contents all over the floor. He turned around (and) came towards me (and) pushed me pretty hard. I fell then got back up and slapped him as hard as I could (and) he caught my arm and twisted it and said don't ever hit me again. I went into the bedroom upset, locked the door, sat on the bed furious and impulsively wanted to do something to hurt him back. I got in his closet and starting (sic) pulling out his stupid magazines that are so precious to him and began to say, "No, not the magazine I'm looking for, " rip; I got through half the pile of magazines before he got into the room and then we began to struggle, (I) struck him repeatedly in the face, and scratched him along the back of the neck. I was pinned to the bed at one point yelling and he shoved my chin towards the ceiling sharply and I bit the side off of my tongue, cracked the back of my head and my elbow in the struggle that ensued. We were verbally arguing after that and I proceeded to spit blood all over him and the floor and the walls . . .

Areole said that she went to the local Army hospital for treatment, but told the treating physicians she was injured due to a fall.

h. Also on 2 February 1997, Petitioner was served with a military protective order directing him to remain away from Areole and their children. This order was extended on 11 February 1997. Additionally, Petitioner was once again placed in the FAP. The local Family Advocacy Case Review Committee (CRC) met on 25 February 1997 and agreed on a finding of mutual spouse abuse.

i. It appears that Areole was directed to participate in a domestic violence seminar (DVS). On 27 March 1997 Captain (CAPT; O-3) C, the Army social worker conducting the DVS, reported, in part, as follows concerning what another attendee had told him:

(Ms. S) (s)tates she has been talking with (Areole) since being in DVS together . . . (Areole) told (Ms. S) that Matt (Petitioner) is abusive towards Dustin both now and in the past. In the past, Matt hit child so hard that he bled from ear; pushes him against the wall, and smacks him around.

Recently, (Ms. S) has been caring for Dustin ([Petitioner's] stepson). Child told her that Matt and Areole have fought, that Matt has kicked and thrown his mother around and held a butcher knife to his (Dustin's) neck, that Matt constantly accuses him of everything that goes wrong and tells him (and others in child's presence)

that, "You're not my kid, you're lazy and you're a puss." There are holes in the ceiling from Matt shooting (a) BB gun into it. He also shoots the dog and Dustin too according to the boy and Areole.

On 14 March 97, the couple went to (Petitioner's and Areole's) home. (Their) 4 (year-old) was chasing Dustin and Zeek (Dustin's friend) with a squirt bottle and fell, cutting her face under her left eye. Matt heard (the) child crying, and asked (her) what happened; she continued to cry. Matt then grabbed Dustin by the lapels and shook him, yelling, "You're the oldest fucking kid, you should stop her from doing things to get hurt. Get to your fucking room." He then took Dustin to Dustin's room; Zeek followed them into the room . . . Dustin and Zeek (later) told Areole and (Ms. S) . . . that Matt had pushed . . . Dustin, squeeze his face between both hands, and then slapped Dustin on the side of the head, which caused his head to hit the wall . . .

Angela S later executed a sworn statement that was essentially consistent with the statement of CAPT C.

j. CAPT C also reported that Zeek told him that on 14 March 1997, Petitioner "took Dustin into (the) room and struck him in (the) head with his knuckles." Zeek also told CAPT C that Petitioner had called Dustin "the F-word and the A-word," and also said that Dustin "gets into trouble whenever his sister does something wrong." When Dustin was interviewed by CAPT C, he said Angela S falsely accused Petitioner of breaking into her house and having sex with her, and also falsely alleged that Areole tried to "hit on Angela's husband. Dustin denied that Petitioner had ever shot him with a BB gun, but said he had shot their dog. He also said Petitioner had hit him "w/palm of hand" during the incident with his sister on 14 March 1997.

k. Several acquaintances of Petitioner signed statements in which they said that on certain occasions when he was unhappy with Dustin, he had called his stepson a "pussy" or a "wuss." Some of these individuals also indicated that Petitioner had physically abused his son, and used the word "nigger." A subsequent search of Petitioner's residence produced a BB gun and a box of BB's. Investigators also noted that they "observed BB holes and marks on the exterior of the residence under the overhang of the quarters and on the ceiling of the carport."

l. On 28 March 1997, after waiving his rights under Article 31 of the Uniform Code of Military Justice, Petitioner was interviewed by military investigators. The report of that interview reads, in part, as follows:

(Petitioner) denied physically abusing his (step) son. He also denied abusing his dog and shooting it with a BB gun on purpose. He did admit that a BB accidentally hit the dog

when it ricocheted. He denied shooting his son with the BB gun. He admitted that he did yell at his son and call him a pussy. He admitted that he fired the BB gun around and inside the house, but blamed his son for most of the damage to the walls and ceiling. He admitted having the BB gun inside the house, but did not believe that having a BB gun . . . was in violation of . . . housing instructions. He admitted that the housing instruction prohibited the use of the BB gun outside, but assumed that the instruction allowed him to fire the BB gun inside the house.

m. On 10 April 1997, Petitioner was placed on report for five specifications of violating a general order or other regulation, including the regulation prohibiting firearms in base housing and the military protective order; one specification of damaging government property, his on-base quarters, by discharging a BB gun; two specifications of assault, upon Areole on 20 January 1997 and upon Dustin on 14 March 1997; two specifications of using indecent language to Dustin, by telling him "You're the oldest fucking kid, get to your fucking room," on 14 March 1997 and repeatedly calling him a "pussy;" one specification of obstruction of justice by threatening to hurt Aerole if she reported the incident of 20 January 1997, and two specifications of communicating a threat to injure Aerole if she revealed his abuse. Petitioner's command then initiated nonjudicial punishment (NJP) action based on these allegations. An NJP hearing was held on 14 April 1997, at which the commanding officer (CO) withdrew two of the specifications alleging orders violations, although not the two set forth above. However, on that same date, Petitioner refused to accept NJP and demanded trial by court-martial.

n. On 13 April 1997 the CRC substantiated a case of child abuse against Petitioner. Among the courses of action recommended by CRC were continuation of the military protective order, reclassification of Petitioner out of the law enforcement field, and consideration for discharge. Accordingly, on 15 April 1997, it was recommended that his law enforcement Navy Enlisted Classification (NEC) be removed. In this recommendation, it was noted that Petitioner failed to reveal the 1993 civil conviction when he first applied for the NEC.

o. On 9 May 1997 administrative separation action was initiated against Petitioner by reason of misconduct due to commission of a serious offense as evidenced by his failure to obey a general order and other regulation, assault and battery, indecent language, obstruction of justice, and communicating a threat. On that same day, he elected to present his case to an administrative discharge board (ADB).

p. Petitioner's ADB met on 19 and 20 June 1997. At the outset of the proceedings, the recorder, Lieutenant (LT; O-3) E, introduced evidence pertaining to the allegations of misconduct. He also introduced excerpts from Part IV of the *Manual for*

Courts-Martial (1995) (MCM) explaining the offenses with which Petitioner was charged. Included in these excerpts was paragraph 89 of Part IV, which covers the offense of indecent language. Subparagraph 89c reads as follows:

Explanation: "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards . . .

Petitioner's Marine defense counsel, Captain (CAPT; O-3) J, introduced evidence from his service record and numerous written statements, all attesting to his past and present performance of duty.

q. One of the government witnesses called by the recorder was a LT B, the security officer and Petitioner's department head. Although LT B characterized him as a "good worker," he opined that Petitioner should not work in security, and should be discharged. In this regard, LT B cited his failure to disclose the 1993 conviction when applying for the law enforcement NEC; problems with duty performance, including an instance in which he improperly chambered a round in his weapon; his financial situation; his racism; and especially his "spousal abuse" and "the way (he) talks to his kid." On cross-examination, CAPT J pointed out that other members of the security department were not removed despite misconduct that was arguably worse than Petitioner's. Specifically, one individual got drunk and shot a hole in through a gate and into a residence with his personal firearm, another member was convicted of domestic violence in civil court, and yet another man was found playing with his weapon while on post.

r. DR F, a clinical psychologist, testified that he had been seeing Petitioner and his family for about three months and characterized his abuse as emotional rather than physical. When asked whether there had been physical abuse to Areole or Dustin, she said, "I don't think so." However, she also said, "I don't think so," when asked whether Petitioner should remain on active duty. Concerning Petitioner's treatment of Dustin, DR F said that Dustin told her that his stepfather had used bad language, but she said, "I feel him correcting the kid." She also said she had seen Petitioner demonstrate affection to Dustin, specifically, "I've seen him hugging (Dustin) and kissing him." Concerning the possibility of physical abuse towards Dustin, she agreed with CAPT J that Petitioner "knocked him on the head once," but stated that she did not consider such action to be child abuse.

s. A Marine Sergeant (SGT; E-5) L then testified on Petitioner's behalf and stated that CAPT C had initially

classified him as a child abuser, but that this classification was later shown to be erroneous. However, on cross-examination, SGT L admitted he knew nothing about Petitioner's case.

t. Army Specialist (SPC; E-4) S, the husband of Angela S, testified for the defense and stated that his wife "has a hard time distinguishing the truth." He also testified that on one occasion, while Petitioner was present, she said that "she would like to, at some point, bring (Petitioner) back to our house and have sex with him without me there." SPC S also accused his wife of filing a false claim of spousal abuse against him. Concerning the incident of 14 March 1997, he said he did not witness any physical abuse of Dustin, and, contrary to the statement of Angela, Dustin's ear was not bleeding. A Ms. W also testified that Angela told her that on one occasion she told Petitioner she would "take (him) back to the barracks and fuck him." Ms. W also said that Angela had paid Dustin a small amount of money to stay at her house, and became angry when he told her that Petitioner and Areole did not like her. Ms. W said Angela was angry with Petitioner because of "being rejected and that they didn't like her and stuff."

u. A retired Army Master Sergeant (MSGT; E-8) S, a former supervisor of Petitioner testified on his behalf and said that he had done well in security. Responding to the hypothetical of CAPT J that Petitioner was not guilty of physical abuse of his wife or stepchild, MSG S said, "I think there is a place for him in the Navy, but not in security. I don't think he should be a cop." He also testified that he thought it was possible that "there was going to be some collision (sic) there on the part of (Petitioner) and (SPC S) . . . in their admin boards." However, he later objected to the recorder's statement that the two were "trading testimony." Petitioner's current supervisor testified that Petitioner had performed well doing "odd jobs" since his security classification had been removed, and should be retained.

v. Areole then testified on behalf of Petitioner. She gave her version of events concerning the incident of 20 January 1997 and indicated that her husband did assault her on that date. However, she had been drinking, provoked him, and also assaulted him. She said that both Petitioner and she used bad language, "using the 'F' word and stuff like that." She indicated, however, that Petitioner was not a threat to the children. She also testified about the 1993 incident which resulted in his civil conviction.

x. Petitioner then testified under oath and provided information on his background and his version of events concerning the 1993 incident and the after-effects. He then discussed his tour of duty at Panama, including some of the counseling and other performance problems. Petitioner then stated as follows concerning the incident of 20 January 1997:

. . . (S)he picked my bag up, threw it on the floor and my tape recorder broke and my papers were scattered. I said, get your f--ing ass out of the house. I could have used nicer words, but that's what I said to her. She got upset with me. I can't remember if she grabbed me or smacked me, or what she did, but that's when the first push came in. I pushed her back away from me. I don't remember if it was once or twice at that time, but I pushed her and I was wrong. I was picking up my bag with all my stuff in it. She had went (sic) to the bedroom, it was quiet in there, and I wanted to get my stuff and leave . . . I walked into the bedroom . . . and . . . all my magazines, all my papers on different things, things that meant something to me, were on the floor. She ripped them up and threw them all over the room. I walked over there and grabbed the stuff from her, cursed at her, I can't remember what I said. Then she started scratching, hitting smacking, punching, whatever you want to call it. I pushed her off me, I told her that she was out of control. When I turned around to walk out of the room, she was behind me . . . with her arms around me, scratching me . . . That's when I grabbed her arm, twisted her arm around . . . down on the bed. Her arm went up against her chin. I pushed her down and as soon as I pushed her down, she kicked me . . . I tried to walk out the door again, she jumped on my back. She was hitting me and I got her off me. I pushed her once, I pushed her twice, but she kept coming at me. The third time I pushed her, I pushed her hard . . . (I did not) intend to inflict any harm to her. I pushed her, she hit her head and started crying. I didn't notice the blood in her mouth. She got up and started spitting in my face, yelling at me and everything. I said, calm down, you're out of control. I said, this is way out of control. I went next door . . .

Petitioner then discussed several of the other allegations against him and said that in his opinion, he did not violate the protective order by being alone with his wife. He also admitted to using the "F" word around Dustin. He denied the allegations of obstruction of justice and communicating a threat. He requested retention in the Navy, stating that he believed he was an asset and could not afford the counseling he was getting if he was discharged.

y. After LT E and CAPT J made final arguments, the members of the ADB retired for deliberations. The summarized record of the ADB proceedings shows that upon reconvening, the senior member announced the findings and recommendations of the ADB. However, the record does not reflect the specific nature of those findings and recommendations. The worksheet completed by the members does show that the ADB unanimously found that Petitioner committed misconduct by reason of commission of the serious offenses of failure to obey a regulation, assault and indecent language; but that he did not commit the offenses of destruction of government property, communicating a threat or obstruction of

justice. The recitation of the evidence considered appears to indicate that concerning the allegation of disobedience of regulations, the ADB found that Petitioner violated the general regulation prohibiting BB guns in base housing but not the other regulation, the protective order. It also appears that the ADB found that Petitioner assaulted Areole on 20 January 1997, but not Dustin on 14 March 1997. The worksheet also reflects that initially, based on its finding that Petitioner violated a regulation, the ADB unanimously recommended retention. Its finding that Petitioner committed assault resulted in a unanimous recommendation for a discharge under other than honorable conditions (OTH) but that separation be suspended for 12 months. The ADB recommended an immediate OTH discharge based on its finding that Petitioner used indecent language. The record of proceedings notes that the senior member advised both the recorder and Petitioner's counsel that the worksheet in the Naval Military Personnel Manual (MILPERSMAN) "does not allow a final disposition," but then stated as follows:

It is requested by the respondent's counsel and the counsel of the government to provide (a) final disposition should that be required by higher authority. By a vote of 2-1, the (ADB) recommends separation. By a vote of 2-1 the recommendation is OTH . . .

A handwritten comment on the worksheet is consistent with the foregoing.

z. On 25 June 1997 CAPT J submitted a letter of deficiencies which states, in part, as follows concerning the ADB's findings and recommendations:

The following are the findings of the (ADB):

Failure to obey a lawful general order for shooting his BB gun in government housing: by a vote of 3-0, misconduct.

Failure to obey other (order,) the Military Protection Order issued: by a vote of 3-0, no misconduct.

Assault and battery for pushing his wife while they were in a fight: by a vote of 3-0, misconduct.

Indecent language for using curse words around his son: by a vote of 3-0, misconduct.

Obstruction of Justice: by a vote of 3-0, no misconduct.

Communicating a threat to his wife: by a vote of 3-0, no misconduct.

The recommendations of the (ADB) . . . were as follows:

For shooting the BB gun in the house: by a vote of 3-0, retain.

For the assault and battery on his wife by pushing: by a vote of 3-0, suspended discharge for 12 months in order to get counseling, if the member failed to successfully complete counseling, then separate with an . . . (OTH).

For using indecent language around his child: by a vote of 2-1, separate with an OTH.

CAPT J then stated as follows concerning what happened at the conclusion of the ADB proceedings:

After reciting the (ADB's) Findings and Recommendations, the Senior Member adjourned the proceedings. At this time, I asked the Senior Member what was the (ADB's) final analysis: whether my client was retained, had a suspended discharge pending, or whether my client was to be separated and receive an OTH. The members discussed it with me and (LT E), the Recorder. (LT E) told the (ADB) that even though it had awarded an OTH for only one of the findings of misconduct, (Petitioner) must receive the OTH despite the other recommendations. I disagreed vehemently but the members nodded their heads in agreement with (LT E), deliberated for a few short minutes and then came back in and stated that (Petitioner) was to be separated with an OTH. (emphasis in text)

CAPT J then pointed out the "vague and confusing" worksheet and asserted that because of this problem and the "inflammatory directive" of LT E, the ADB members "felt that they had to separate (Petitioner) with an OTH because that was the worst of the three recommendations they had put down on the worksheet. " CAPT J further argued that Petitioner was now being recommended for an unsuspended OTH only because of "bad parenting skills," specifically, the indecent language he used in Dustin's presence. CAPT J also contended that the following information was "of great importance:"

The documentary and testimonial evidence revealed that the marriage of Petitioner and Areole was characterized by mutual abuse, not simply abuse by Petitioner.

Petitioner admitted that the indecent language he used towards his son was inappropriate; however, testimony indicated that this language was not used consistently and Dustin also received "positive reinforcement" from Petitioner.

DR F testified that there was no physical abuse of any of the children of Petitioner and Areole.

CAPT C had, on a previous occasion, erroneously concluded that an individual was guilty of physical abuse of a child.

The basis for the allegations resulting from the incident of 14 March 1997 was the statement of Angela S, who was proven to lack credibility.

Petitioner was deemed unsuitable to continue in the security NEC when other individuals serving in that career field with Petitioner had committed worse misconduct.

CAPT J concluded by stating that Petitioner's separation would not be in his interest or the Navy's, and that "his naval career and his family can be saved if (he) is allowed to continue on active duty."

aa. On 17 July 1997 the CO endorsed CAPT J's letter of deficiencies, recommending Petitioner's immediate discharge with an OTH. In his endorsement, the CO did not address or take issue with CAPT J's recitation of the ADB's findings and recommendations. The CO addressed as follows CAPT J's contention about the events which occurred at the conclusion of the ADB:

(On 3 July 1997) my Executive Officer discussed (CAPT J's) letter with the (ADB's) senior member. Contrary to (CAPT J's) assertion . . . (the senior member) recalled that the members made an independent decision. He stated that he did not consider LT (E's) remarks to be inflammatory and does not characterize the post-findings discussion--which was prompted at (CAPT J's) request--to be one in which advice was sought from either side.

It seems clear that, prior to the post-findings discussion which (CAPT J) finds objectionable, by a 2 to 1 vote the members recommended immediate separation of (Petitioner) with an OTH discharge . . . Per (CAPT J's) request, the members immediately met in closed session to reach a "final recommendation" in a format acceptable to (CAPT J) and his client. Again, the (ADB) returned and announced, by a vote of 2 to 1, their recommendation that (Petitioner) be separated with an OTH discharge.

The CO then went on to address some of counsel's other contentions. He initially noted that although there was a finding of mutual abuse, Petitioner admitted that he initiated the physical contact by grabbing her when she started going through his bag. The CO then pointed out that when DR F said there was no physical abuse of the children, he was unaware of the July 1993 incident. The CO then characterized the incidents of misconduct by other members of the security force as "not particularly relevant," but went on to distinguish these incidents from Petitioner's case. Concerning the contention that Petitioner's family could be saved if he was retained, the CO

noted that it appeared Areole had separated from Petitioner. The CO then concluded his endorsement as follows:

. . . I do not believe that the (ADB) recommended that (Petitioner) be separated simply due to "bad parenting skills." The evidence presented at the (ADB) indicated that (Petitioner) was involved in a pattern of physical and verbal abuse toward both his wife and his stepson. The (ADB) apparently based its recommendation to separate (Petitioner) due to his conduct toward his stepson, not toward his wife. Dustin . . . is an eight-year old boy who, unlike his mother, had no choice but to remain in that abusive environment. There appears to be no ambiguity in the (ADB's) decision. By a 2 to 1 vote, the members recommended that (Petitioner) be separated (OTH). I concur.

bb. By separate correspondence of 22 August 1997, the CO forwarded the ADB proceedings to the Bureau of Naval Personnel and reiterated his earlier recommendation for an OTH discharge. On 11 September 1997 the Chief of Naval Personnel (CNP) directed such action. Although there is no Certificate of Release or Discharge From Active Duty (DD Form 214) in the record, service record entries reflect that Petitioner was not discharged until 6 February 1998, after about eight years and six months of service.

cc. In his application to the Board, Petitioner incorporates by reference the contentions set forth in his military counsel's letter of deficiencies of 25 June 1997. He further contends that given the applicable case law, his comments to his son did not constitute the offense of indecent language under UCMJ Article 134 and, accordingly, it was improper to process him for separation due to those remarks.

dd. Because of Petitioner's contention, the case was submitted for an advisory opinion to the Deputy Assistant Judge Advocate General for Criminal Law (JAG-20), who responded, in part, as follows by letter of 16 August 2000:

(T)he President has constrained service members' speech rights by prohibiting indecent language under paragraph 89 (of Part IV to) the (MCM). Speech is criminal under this provision if it is indecent and is prejudicial to good order and discipline or is of a nature to bring discredit upon the military . . .

. . .

(T)he sole test for indecency (is) the President's definition provided in the MCM . . . Looking then, to the MCM, "Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.

(Petitioner's) language would not reasonably tend to, nor was it apparently calculated to, incite libidinous thoughts. He purportedly used foul language as a misplaced and inappropriate disciplinary tool and to express his displeasure with . . . his son's behavior. (Petitioner) apparently uttered these words out of anger and not out of any lustful or libidinous motive . . .

The context in which the comments were made is critical and courts will often look for an inappropriate sexual relationship to give indecent meaning to an otherwise harmless comment. There is no evidence that (Petitioner) was sexually abusing his son but, instead, he used the language either to express his rage and displeasure or to demean his son. This fact distinguishes this case from others in which the mere vulgarity of the speech was sufficient to warrant a conviction for indecent language. (citations omitted)

JAG-20 went on to opine that not only did Petitioner's comments fail to meet the requirements for indecent language, they did not constitute a violation of any other UCMJ article.

ee. Because of the favorable opinion from JAG-20, the case was submitted to the Bureau of Naval Personnel for comments on the issue of whether Petitioner's discharge should be set aside. By letter of 22 September 2000 the Enlisted Performance Branch (Pers-832) responded, in part, as follows:

. . . I concede to the JAG opinion regarding the indecent language issue. However, petitioner was found by an (ADB) to have committed misconduct due to commission of a serious offense for assault and battery on his wife. The (ADB) recommended an other than honorable discharge suspended for 12 months. In accordance with (the MILPERSMAN), the separation authority directed immediate discharge.

The petitioner, his wife, and some of their associates managed to create an atmosphere of turmoil and distress for years. A thorough review of the petition reflects marital mayhem and domestic discord at the highest levels. To reinstate petitioner to active duty would invite more grief for all concerned . . .

Accordingly, Pers-832 recommended that no relief be granted to Petitioner.

ff. Both advisory opinions were sent to Petitioner's counsel for comment. He responded by letter of 17 October 2000, contending that "(Petitioner's ADB) did not meet due process requirements and was tainted when the (ADB) had to consider alleged misconduct (indecent language to a child) that should have never been before them." Counsel then said that the only other specification of misconduct which resulted in a

recommendation for separation was the one alleging assault and battery, and the ADB mitigated it by further recommending suspension of the separation. Counsel also asserted that the allegation of disobedience by shooting the BB gun resulted in a finding of no misconduct as well as a recommendation for retention. Accordingly, counsel argues that "(h)ad the separation authority only been reviewing the package with only one finding of misconduct with a recommendation toward suspending the discharge, the separation authority may very well have suspended the discharge and allowed (Petitioner) to attend counseling."

gg. At the time Petitioner was processed for separation, Article 3630605 of the MILPERSMAN authorized separation by reason of misconduct due to commission of a serious offense. An offense is "serious" if conviction at trial by court-martial could result in a punitive discharge, and the circumstances of the offense warrant separation. Appendix 12 of the MCM states that a punitive discharge may be imposed upon conviction of failure to obey a general regulation, assault and battery, or indecent assault.

hh. MILPERSMAN Article 3640350.5f stated that after reaching its findings, an ADB "shall . . . recommend retention or separation;" and, if separation is appropriate, "may recommend that the separation be suspended," and "shall . . . recommend a characterization of service." However, the suggested format for findings and recommendations set forth at MILPERSMAN Article 3640350.7 called for a separate recommendations for each finding on the issues of separation or retention, suspension of a separation, and characterization.

ii. MILPERSMAN Article 3610240.3 stated that suspension of a separation for up to 12 months was appropriate "if the circumstances of the case indicate a reasonable likelihood of rehabilitation." Article 3610220.3 stated that if an ADB recommended a suspended separation, the discharge authority could approve separation but disapprove the recommendation for suspension. The discharge authority could also direct a better characterization of service than that recommended by the ADB. The separation authority could not overturn an ADB's recommendation for retention, but was authorized to recommend that the Secretary of the Navy direct discharge notwithstanding the ADB's recommendation.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. The Board finds no merit in his requests to set aside his discharge and reinstate him in the Navy, but does believe it would be appropriate to recharacterize his discharge.

Regarding Petitioner's assertion that the contentions in his military counsel's letter of deficiency warrant a recommendation for the requested relief, the Board agrees with the comments of the CO in his endorsement of 17 July 1997 to the effect that those contentions were without merit.

The Board cannot so easily dismiss Petitioner's contentions to the effect that his comments to his son did not constitute the "serious offense" of indecent language and, therefore, the discharge action was fatally flawed. In analyzing this issue, the Board initially notes that the findings and recommendations of the ADB, as originally announced by the senior member, were not totally clear. In his letter of deficiencies CAPT J set forth his version of those findings and recommendations in painstaking detail. In his endorsement, the CO did not take issue with the defense counsel's recitation. Accordingly, the Board believes that the ADB found that Petitioner committed only the offenses of failure to obey a lawful regulation, assault and indecent language. Its initial recommendations were retention for the disobedience, a suspended OTH discharge for the assault, and immediate discharge for the indecent language. It is very clear that after further deliberation, the ADB recommended an unsuspended OTH discharge.

Given Petitioner's contention, the favorable JAG-20 advisory opinion and the concession in the Pers-832 opinion, it is also clear to the Board that Petitioner's comments to his son, although vulgar and totally inappropriate, did not constitute the offense of indecent language or any other UCMJ offense. Since there was no UCMJ offense, it was error to include indecent language as one of the serious offenses for which Petitioner was subjected to separation processing. Not only was Petitioner so processed, the ADB believed this allegation was extremely significant since it was the only one which resulted in a recommendation for an unsuspended OTH discharge. However, the Board believes it is equally important to note that Petitioner was properly processed for misconduct due to commission of a serious offense based on the allegations of disobedience of a lawful order and assault, and the ADB found that both of these allegations were substantiated. Those findings resulted in recommendations for retention and a suspended OTH discharge, respectively. Along these lines, in his letter of 17 October 2000, counsel implies that the ADB only found that the assault allegation was substantiated, but such is not the case. The ADB could properly find that Petitioner's failure to obey the regulation did not warrant separation, yet recommended retention.

Accordingly, the Board had to address the issue of what would have been the likely disposition of Petitioner's case had the ADB found misconduct due only to the serious offenses of disobedience and assault. Clearly, given the ADB's specific recommendations concerning these offenses, such a finding would have resulted in either a recommendation for retention or suspended discharge, and not an unsuspended discharge. The Board believes it is most

likely that the ADB would have recommended a suspended separation. When the ADB was asked to come up with a single recommendation, it chose unsuspended separation, the least favorable of its three recommendations. It seems likely that had they been aware that Petitioner was only guilty of disobedience and assault, it would have chosen the least favorable recommendation resulting from those two findings--a suspended OTH discharge. However, this conclusion does not, in and of itself, compel a recommendation for relief. Under the applicable provisions of the MILPERSMAN, a recommendation that a separation be suspended is just that--a recommendation that the separation authority may, in his or her sound discretion, approve or disapprove. The Board believes that although it seems likely such a recommendation would have been made by the ADB, the separation authority, CNP, almost certainly would have disapproved it and recommended immediate discharge. The Board believes the ADB failed to give sufficient weight to the provisions of the MILPERSMAN which stated that a suspended separation is appropriate only if there was "a reasonable likelihood of rehabilitation." The evidence of record reflects no such likelihood. In July 1993, more than three years before the events which resulted in Petitioner's separation processing, he was enrolled in the FAP, and underwent treatment in that program for nearly 18 months. Although he completed that program at the end of 1994, the evaluator warned that there might be a relapse. Regrettably, this proved to be a prescient comment given Petitioner's subsequent actions. Accordingly, since attempts to rehabilitate Petitioner in the 1993-94 time frame obviously were unsuccessful, there would appear to be little basis for the ADB's belief that another attempt at rehabilitation would be successful. It is also significant to the Board that even after Petitioner was reenrolled in the FAP in February 1997, he subsequently was involved in another incident of inappropriate behavior on 14 March 1997.

In reaching its conclusion that CNP would have disapproved the ADB's recommendation for a suspended discharge, the Board was aware that members of an ADB are officers and senior enlisted personnel from the respondent's command who may have only a passing familiarity with the intricacies of administrative separations. The separation authority in this case, CNP, has more expertise in such matters and may also call on the specialists in Pers-832 for advice and assistance prior to taking action in a given case. It can be assumed that these officials would give more weight to the binding guidance concerning suspension of a separation set forth in the MILPERSMAN than the ADB members, who are less familiar with that guidance. This conclusion is borne out by the Pers-832 advisory opinion, which indicates that continued service would not have been appropriate.

Accordingly, the Board does not believe that CNP would have approved the recommendation for a suspended discharge. However, the facts and circumstances of this case leave the Board with some doubt as to whether, having disapproved that recommendation,

CNP would have approved a characterization of service of OTH. In this regard, it is important to note that CNP's decision to direct such a discharge was based, in part, on the erroneous finding that Petitioner was guilty of indecent language as well as disobedience and assault. Additionally, CNP would be well aware that the ADB did not want Petitioner to receive an OTH discharge, the worst possible administrative discharge, without a last chance at rehabilitation. CNP also would have taken into account that characterization of service is based on the individual's record in the current enlistment and during Petitioner's last enlistment, which began in August 1993, he had no military disciplinary actions and his service was characterized by good duty performance. Additionally, one of the incidents that resulted in processing for separation, the disobedience of a regulation, was not deemed sufficiently serious to warrant separation. Petitioner's other offense, assault and battery upon Areole, while more serious, was the product of a tumultuous marriage. Taken as a whole, the Board believes that CNP might well have concluded that although Petitioner's behavior was incompatible with further military service, he was not entirely to blame, and his service during his last enlistment warranted better than an OTH discharge. The Board itself also believes this would have been the most appropriate action in this case.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 11 September 1997, the Chief of Naval Personnel directed that Petitioner receive a general discharge by reason of misconduct and, on 6 February 1998, he was so discharged, vice the discharge under other than honorable conditions actually issued on that date.

b. That no further relief be granted.

c. That upon request, the Department of Veterans Affairs be advised that Petitioner's application was received by the Board on 14 May 1999.

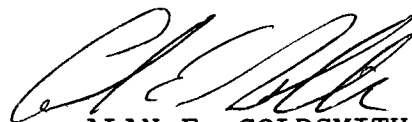
d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and


complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 5e of the Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6[e]), and having ensured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the provisions of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director